HUMAN RIGHTS IN THE UNITED STATES: TWO DECADES' DEVELOPMENT

by David S. BOGEN, LL.B., LL.M.

Assistant Professor of Law
University of Maryland — School of Law
Baltimore, Maryland

This paper surveys the development of human rights in the United States during the past two decades. Even brief comment on all matters which might be considered human rights would require a book. This more modest undertaking discusses only those rights arising out of the creation of a democratic system of government, the protection of individual rights in a system of criminal justice, and the protection of minority groups against discrimination.

The focus of this discussion is on the decisions of the courts. The legislature and the executive establish some principles of human rights (1) and they provide procedures to effectuate principles derived from other sources (2). But our most basic human rights are guarantees in the Constitution, and it is the function of the Supreme Court to interpret those guarantees in the specific cases before it. Since the government has enforced the Court's decisions with respect to the parties before the Court, those decisions mark a point at which rights will be vindicated.

Victory in a law suit does not mean that no one will ever deprive another of that particular right again. Men and

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(1) *E. g.* « The Congress declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy... to coordinate and utilize all its plans, functions and resources for the purpose of creating and maintaining... conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production and purchasing power. » 15 U.S.C. 1021 (1946). Also Congress has provided minimum wage and hour laws (Fair Labor Standards Act 29 U.S.C., § 201-19) and granted workers the right to organize unions free of employer interference (National Labor Relations Act 29 U.S.C., § 151-68).

(2) *E.g.* Laws requiring the presentation of opposing viewpoints in the radio and television industry. 45 U.S.C., § 315 (a) (1964) ; 37 C.F.R. 73.123, 73.300, 73.595 and 73.679. See also the legislation discussed in the text affecting voting rights, public accommodations and employment.

governments will always do what the laws and the courts declare is wrong. The victims of such acts may not be able to get damages or a court order to remedy such wrongs. They may not have the sophistication or financial resources necessary to commence litigation. They may fear that social pressures against them for having brought suit would be more harmful than any benefit derived by such suit. Finally, they may be defeated in their suit by procedural obstacles before they can get a decision on the merits. However, it remains true that the decisions of the United States Supreme Court interpreting the Constitution provide the basic yardstick by which to measure the progress of human rights in the United States over the past twenty years.

I. — Democratic government

Electoral procedures have become far more democratic in the past ten years as a result of several major changes. A Constitutional amendment, new statutes and judicial decisions have made it easier for the poor man and black man to vote and have made each person's vote of equal effect. Progress has been less dramatic in other areas which are preconditions for a democratic society, but speech and travel have fewer restrictions as a result of judicial decisions over the past twenty years. The separation between church and state has been increasingly defined and an uneasy compromise between religious toleration and religious need maintained.

A. — THE RIGHT TO VOTE

Questions of civil rights and civil liberties generally arise in the context of the relationship between the individual and his government. Thus the basic civil right is free and equal suffrage. Unless the government is responsive to the people and each individual has an equal participation in the creation of the government, the gap between the citizen and te government will widen to the detriment of both civil rights and the citizen's respect for the law.

In 1964, a constitutional amendment was adopted.

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator

or Representatives in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax (3).

Untill 1966. however, the rights to vote for state office was still conditioned in some states upon the payment of a poll tax of up to $ 2. Then the Supreme Court declared such a tax unconstitutional as a violation of the Fourteenth Amendmend of the Constitution which prohibits a state from denying any person "equal protection of the laws". The Court stated : "Wealth or fee paying has, in our view, no relation to voting qualifications ; the right to vote is too precious, too fundamental to be so burdened or conditioned (4)." The Court also invalidated on the basis of the "equal protection"clause, a provision of a state constitution which prevented members of the armed services who moved to that state from acquiring a voting residence there. "There is no indication in the Constitution that... occupation affords a permissible basis for distinguishing between qualified voters within the State (5)." Even elections for a limited purpose, and not for general representation in the government. must include all qualified voters having the requisite of residence and age unless "the exclusions are necessary to promote a compelling state interest (6)." Under this standard , the Court invalidated a provision for school board elections which required voters either to own taxable real property within the school district or be parents of children enrolled in the local public schools (7).

The most difficult voting problem in the United States has been to implement the Fifteenth Amendment guarantee that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude (8)." The Court invalidated the exclusion of negroes by a political party in its primary election where that political party dominated elections in a county (9). It held that a city could not redefine its borders in order to exclude the areas where negro voters lived (10). In another case, the

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(3) U.S. Const. amend. XXIV.
(4) *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966).
(5) *Carrington v. Rash*, 380 U.S. 89, 96 (1965).
(6) *Kramer v. Union Free School District*, n° 15, 395 U.S. 621 (1969).
(7) *Id.*
(8) U.S. Const. amend. XV.
(9) *Terry v. Adams*, 345 U.S. 461 (1953). Nominees of the association were always nominated as the candidates of the Democratic party which always won the elections in that county.
(10) *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Court found that a state requirement that voters "interpret" a cause of the state or federal Constitution selected by the voting registrar was part of a plan to deprive negroes of their right to vote, and it affirmed an injunction to stope the use of such a test (11). Even where the literacy test was fair on its face and fairly administered, the Court struck it down where its effect, because of a prior disability in education, was to deprive large numbers of negroes of the franchise (12). Further, states cannot designate the race of candidates on the ballot (13).

But judicial action faced formidable obstacles. Case by case adjudication is a slow piecemeal process. Negroes were afraid to bring suit for fear of the community reaction against them. Even after the Civil Rights Act of 1957 gave the Attorney General a power to bring suit against a state and its officials to protect the voting rights of negroes (14), progress was slow. To remedy this deficiency, Congress passed the Voting Rights Act of 1965 (15). The Act covers any state or sub-division of a state which maintained a "test or device" as of November 1, 1964 and where the Director of Census determined that less than 50 % of its voting-age residents were registered to vote on November 1, 1964, or voted in the presidential election of that year. It provided that no person could be denied the right to vote because of this failure to comply with such test or device or any subsequent test or device to which the Attorney General of the United States has objected. In addition, the federal civil service commission was required to appoint voting examiners whenever the Attorney General certified either that he had received meritorious complaints from at least twenty residents that they have been disenfranchised under color of law because of their race, or that the appointment of examiners was otherwise necessary to effectuate the Fifteenth Amendment (16).

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(11) *Louisiana v. United States*, 380 U.S. 145 (1965).

(12) *Gaston County, North Carolina v. United States*, 395 U.S. 285 (1969).

(13) *Anderson v. Martin*, 375 U.S. 399 (1964).

(14) 42 U.S.C. sec. 1971 (c). See *United States v. Mississippi*, 380 U.S. 128 (1965).

(15) 42 U.S.C. sec. 1973 et seq.

(16) These provisions were upheld as a proper exercise of congressional power under the Fifteenth Amendment in *State of South Carolina v. Katzenbach*, 383 U.S. 301 (1966). The Voting Rights Act also stated that no person who completed the sixth grade in a public school or in a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English could be denied the franchise because of his inability to read or write English. This was upheld as constitutional in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The Voting Rights Act of 1970, 84 Stat. 314 extended the right to vote to 18 year olds. In most states the age limit was 21 years. The validity of the Act is being challenged in the Supreme Court.

The value and the purpose of the right to vote is diminished unless every person's vote is given equal weight. In almost every state, each person's vote was counted equally in choosing the representative from his area (17). However, in many states the number of persons represented by each legislator varied widely. Thus, the vote of a legislator representing 10,000 would be equal to the vote of a legislator representing 90,000. Prior to 1962 the Court refused to decide the constitutionality of disproportionate districts on the grounds that the issue was political and not judicial in nature (18). In 1962 the court held that the issue should be decided (19). In subsequent decisions it held that congressional districts for representation in the federal House of Representatives must be equal in population (20), that the seats in both houses of a bi-cameral state legislature must be apportioned on a population basis (21) even if the majority of the state's voters approve a different basis (22), and that offices in the local county within a state must be voted for on a population basis (23).

> *Legislators represent people, not trees or acres... Weighing the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable... Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsible to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of person standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and*

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(17) But see *Gray v. Sanders*, 372 U.S. 368 (1963) which invalidated Georgia's county unit system under which statewide representatives were chosen in a way which favored rural voters over urban voters.

(18) *Colegrove v. Green*, 328 U.S. 495 (1946).

(19) *Baker v. Carr*, 369 U.S. 186 (1962).

(20) *Wesberry v. Sanders*, 376 U.S. 1 (1964).

(21) *Reynolds v. Sims*, 377 U.S. 533 (1964).

(22) *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713 (1964) stating « A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose to do so. » *Id.* at 736-37.

(23) *Avery v. Midland County*, 390 U.S. 474 (1968).

> *effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators* (24)

Even if the local, state or national office could properly be an appointive one, "once a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications classified, we (The Court) see no constitutional way by which equality of voting power may be evaded.'" (25).

The right to vote would lose its value if the electeed official could not serve. In 1966, the House of Representatives voted to exclude Congressman Adam Clayton Powell Jr., on the basis of his behavior during the preceeding session of Congress. In 1969, the Supreme Court ruled that Congress had exceeded its powers and could not exclude any individual elected by the voters unless such individual was ineligible for office by virtue of qualifications stated in the Constitution (26).

B. — RIGHTS OF FREE SPEECH, ASSEMBLY AND ASSOCIATION

The intelligent exercise of the right to vote is dependent on freedom of speech and press so that all sides of every issue may be examined.

The Constitution provides "Congress shall make no law... abridging the freedom of speech or of the press. (27)" Yet some restriction on speech has always been recognized. "The most stringent protection of free speech would not protect a man in falsely shouting fire in theatre, and causing a panic." (28). The test traditionally used for determining whether

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(24) *Reynolds v. Sims, supra* note 21 at 562, 563, 565. The composition of the federal Senate was not called into question or relevant to the decision since the system of two senators to each state was adopted as a result of a compromise agreement among sovereign states whereas the districts within a state are creations of the state.

(25) *Hadley v. Junior College District*, 397 U.S. 50 (1970) requiring equality in voting for trustees of a junior college.

(26) *Powell v. McCormark*, 395 U.S. 486 (1969). Congressman Powell was seated in the following Congress without incident, but issues involving his back pay during the period of his exclusion are still being litigated.

(27) U.S. Const. amend. I.

(28) *Schenk v. United States*, 249 U.S. 47, 52 (1919).

speech of a political nature may be restricted has been "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." (29). This test has been restated recently as follows : "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (30). For example, the Court reversed the convictions of anti-war protesters where the trial judge stated they could be convicted for doing or saying "that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area." The Court held that conviction on such a ground was an abridgement of freedom of speech (31).

The dominant trend of court decisions in the past two decades has been require any restriction on free speech to be drawn in the narrowest possible terms. In 1941 Congress passed the Smith Act (32) which made it a criminal offense to advocate, abet, advise or teach "the duty, necessity, desira bility, or propriety of overthrowing or destroying the government of the United States... by force or violence... ; ... or ... to organize any society, group or assembly of persons who teach, advocate or encourage the overthrow or destruction of any such government by force or violence ; or becomes or is a member of, or affiliates with, any such society, group or assembly of persons, knowing the purposes thereof." (33). The Supreme Court held that the term "organize" referred only to the creation of a new organization and not to acts thereafter performed in carrying out its activities (34). Further, the Court held that the Smith Act does not prohibit "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end." (35). With respect to the membership clause, the Court held that the statute does not make criminal any membership in an unlawful organization with knowledge of its unlawful

(29) *Id.*
(30) *Brandebourg v. Ohio*, 395 U.S. 444, 447 (1969).
(31) *Bachellar v. Maryland*, 397 U.S. 564 (1970).
(32) 18 U.S.C. sec. 2385.
(33) Upheld as constitutional in *Dennis v. United States*, 341 U.S. 494 (1951). The Smith Act superseded all state legislation proscribing sedition against the United States. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).
(34) *Yates v. United States*, 354 U.S. 298 (1957).
(35) *Id.* at 318.

purpose unless the individual specifically intends to accomplish that purpose by resort to violence (36). Subsequent decisions have made it clear that this interpretation of the statute was based on constitutional requirements of free speech and due process (37).

The application of overbroad criminal subversive legislation has been enjoined before any criminal prosecution was initiated under it and despite the fact that the law might be limited through state judicial construction. "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the propects of success or failure (38)."

States may enact laws punishing false or malicious defamation of racial and religious groups (39), but there can be no prosecution for libel on government (40). An individual public figure cannot recover damages for a defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not (41)."

Means other than civil or criminal penalties have been employed to restrict the expression of ideas antithetical to the government. Two methods are loyalty oath requirements for employment and dismissal from or denial of employment on the grounds of disloyalty. The Court has been quick to strike down loyalty oaths for public employment or state-conferred benefits where they require individuals to prove their loyalty (42) or where their vagueness might be interpreted to cover innocent activity (43) such as membership in an organization without sharing the illegal purpose of the organization (44).

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(36) *Noto v. United States*, 367 U.S. 290 (1961).

(37) *See Aptheker v. Secretary of State*, 378 U.S. 500 (1964) ; *Elfbrandt v. Russell*, 384 U.S. 11 (1966) ; *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1957).

(38) *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

(39) *Beauharnais v. Illinois*, 343 U.S. 250 (1952). This case has been sharply criticized as an improper infringement on the right to speak. *See* EMERSON, *Toward A General Theory of the First Amendment*, 105 (Vintage Books 1966).

(40) *Rosenblatt v. Baer*, 383 U.S. 75, 80 (1966) ; *New York Times Co. v. Sullivan*, 376 U.S. 254, 291-92 (1964).

(41) *New York Times*, *supra* note 29 at 279-80. *See Garrison v. Louisiana*, 379 U.S. 64 (1964) ; *Henry v. Collins*, 380 U.S. 356 (1965).

(42) *Speiser v. Randall*, 357 U.S. 513 (1958).

(43) *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) ; *Baggett v. Bullitt*, 377 U.S. 360 (1964).

(44) *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

Recently a statute requiring the discharge of teachers for the utterance of "seditious" words was invalidated on the grounds of vagueness. The Court said "the danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being sanctioned (45)." The Court has held that a state could not refuse to admit an individual to the practice of law because he was a member of the Communist Party two decades previously (46) and that a statute prohibiting persons from serving on the governing body of a labor organization who are or have been within the last five years members of the Communist Party was invalid as a bill of attainder or "trial by legislature." (47).

The Court has been reluctant to act where employees are discharged from defense establishments (48), but recently it required the reinstatement in a shipyard of an employee who was a member of the Communist Party. The Court pointed out that the flaw in the law was that membership would cause dismissal even if the employee was unaware of the aims of the Communist Party or disagreed with those aims or was a passive member of the organization or the position from which he was fired was not particularly sensitive (although within a "defense facility") (49).

In 1966 a state legislature excluded a representative who stated that he was opposed to the war in Viet Nam and who expressed his admiration for the courage of those persons who burned their draft cards (50) despite the possible jail sentences. The Court held that disqualification because of his statements violated the legislator's right of free expression (51). The Court has even enjoined a high school from suspending students who wore black arm bands to protest the war in Viet Nam where such action did not interfere with the activities of the school or intrude on the rights of other students (52). Finally, the Court has required reinstatement of a school teacher who made remarks critical of the school

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(45) *Keyishian v. Board of Regents*, *supra* note 37 at 684.

(46) *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957).

(47) *United States v. Brown*, 381 U.S. 437 (1965).

(48) *See Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

(49) *United States v. Robel*, 389 U.S. 258 (1967).

(50) In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court permitted conviction for burning a draft card despite arguments that defendant's rights of free speech were violated.

(51) *Bond v. Floyd*, 385 U.S. 116 (1966).

(52) *Tinker v. Des Moines*, 393 U.S. 503 (1969).

system, even though those remarks were false (53). The Court noted that such remarks did not in the particular case prevent the teacher from continuing his work because they were directed at more remote or indirect supervisors rather than immediate supervisory personnel and that such remarks should be protected because they were not knowingly or recklessly false statements.

Expression which is not directly political in nature may also be important to the social fabric of the nation. Control over men's thoughts and expressions in any area may have significant stultifying effects on intellectual exploration and personnel freedom, however necessary such restrictions may be for other reasons. States may ban material where "to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to the prurient interest" (54) and which "goes substantially beyond customary limits of candor in description or representation of such matters (55). Nevertheless, "a work cannot be proscribed unless it is 'utterly' without social importance (56)." In the application of these standards "in close cases, evidence of pandering [in the advertisement and sale] may be probative with respect to the nature of the material in question (57)." The Court has upheld far less stringent standards for obscenity sold to minors (58). However, possession of obscenity in private without any attempt to sell or distribute it is constitutionally protected as part of the protection of free speech combined with a concern over the right of privacy. "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts (59)."

Problems of freedom of expression extend beyond the content of speech to the manner and place where persons may speak. The general principales which govern decisions were stated by former Justice Goldberg when he was on the Court :

> *There is a proper time and place for even the most peaceful protest and a plain duty and responsability on the*

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(53) *Pickering v. Board of Education*, 391 U.S. 563 (1968).
(54) *Roth v. United States*, 354 U.S. 476, 489 (1957).
(55) *Id.* at 487, n. 20; *Manual Enterprises v. Day*, 370 U.S.
(56) *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) ; *A Book Named «John Cleland's Memoirs of a Woman of Pleasure» v. Attorney Genral of Massachusetts*, 383 U.S. 413, 419-20.
(58) *Ginsburg v. New York*, 390 U.S. 629 (1968).
(59) *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

part of all citizens to obey all valid laws and regulations. There is an equally plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal ; for regulation of conduct that involves freedom of speech and assembly not to be so broad in scope as to stifle. First Amendment freedoms, which 'need breathing space to survive' N.A.A.C.P. v. Button, *371 U.S. 415, 433 ; for appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct ; and for all such laws and regulations to be applied with an equal hand* (60).

The massive peaceful demonstrations throughout the United States and especially in Washington against the war in Viet Nam and the policies of the President demonstrate the effectiveness of this commitment to public assembly (61). Although problems have occurred in civil rights demonstrations in the South, the Court has been quick to protect the rights of the demonstrators. For example, a silent demonstration in a public library (62) and a noisy one near a courthouse (63) was permitted, although demonstrations on jail grounds (64) have been prohibited. The Court has held that administrative standards which vest great discretion in the administrative authority are invalid, for the standards must be narrowly drawn to assure that the denial of a permit is not based on distaste for the speaker's or marcher's point of vew (65). Nevertheless, when an injunction is issued against the demonstration, even though the injunction is based on an improper statute or administrative rule, the injunction must not be ignored but must be appealed so long as there is time to do so (66).

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(60) *Cox v. Louisiana*, 379 U.S. 559, 574 (1965).

(61) The processes for peaceful assembly to protet governmental policy broke down during the Democratic National Convention in Chicago, Illinois in 1968. *See Mailer, Miami and the Siege of Chicago.* City officials denied permits to demonstration leaders. Nevertheless, people came to Chicago in large numbers and a riot ensued. The legal consequences of the events of Chicago are still in the courts. Conviction of five of the leaders of the demonstration for « crossing tate lines with intent to incite a riot » is on appeal to the United States Seventh Circuit Court of Appeals. *United States v. Dellinger.* The trial received widespread attention and the processes of the court were subjected to great criticism. The seven defendants and their lawyers were found in contempt of court, but that sentence is also on appeal.

(62) *Brown v. Louisiana*, 383 U.S. 131 (1966).

(63) *Cox v. Louisiana, supra* note 60. But the Court's opinion was based on the indications of Louisiana police that petitioners had not come too near the courthouse would be valid.

(64) *Adderly v. Florida*, 385 U.S. 39 (1966).

(65) *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

(66) *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

The right of free speech, particularly with reference to the regulation of the manner of its exercise, is intimately connected with the right of association. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech (67)." "There are times and circumstances when states may not compel members of groups engaged in the dissemination of ideas to be publicly identified, *Bates v. Little Rock,* 361 U.S. 516 ; *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 462. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance (68)." Similarly, a state statute requiring all teachers to list all organisations to which they belong was invalidated (69). Finally, the Court held that the activities of the N.A.A.C.P. in associating for purposes of litigation were protected by the First Amendment and could not be barred as improper solicitation of legal business (70).

C. — FREEDOM OF RELIGION

Closely connected with freedom of expression is the concept of freedom of religion. This includes freedom to believe as one wishes and to be free from state pressures to induce a particular belief. The Constitution bars the enactment of any law "respecting the establishment of religion, or prohibiting the free exercise thereof (71)."

A notary public cannot be denied his commission because he refuses to declare that he believes in God (72). A state cannot deny unemployment benefits to a Seventh Day Adventist who refuses to take a job offered her which requires her to work on Saturday, her sabbath (73). Congress has exempted from service in the armed forces persons who by reason

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(67) *National Association for the Advancement of Colored People v. Alabama ex rel Patterson,* 357 U.S. 449, 460 (1958).

(68) *Talley v. California,* 362 U.S. 60, 65 (1960).

(69) *Shelton v. Tucker,* 364 U.S. 479 (1960).

(70) *NAACP v. Button,* 371 U.S. 415 (1963). *See also Brotherhood of R.R. Trainmen v. Virginia,* 377 U.S. 1 (1964).

(71) U.S. Const. amend. 1.

(72) *Torcaso v. Watkins,* 367 U.S. 488 (1961).

(73) *Sherbert v. Verner,* 374 U.S. 398 (1963).

of their "religious" training and belief are conscientiously opposed to participation in war in any form. The Court construed this statute to avoid conflict with First Amendment requirements. It held that the individuals before it qualified for the exemption, stating that the test for "religious training and belief" was "does the claim to belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for the exemption (74)." "That section exempts from military service all those whose consciences, spurred by deeply-held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed them-selves to become a part of an instrument of war (75)."

The Court has faced many difficult problems involving the establishment of religion. It held unconstitutional a state program which permitted churches to offer religious classes in the schools to those children whose parents requested such instruction (76). Similarly invalidated were the use of a non-denominational prayer (77) or readings from the Bible at the start of the school day (78). But the public payment for secular textbooks in religious schools has been upheld (79), and the tax exemption for church property has also withstood challenge in the courts (80).

D. — CITIZENSHIP AND THE RIGHT TO TRAVEL

The Constitution proclaims that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States (81)." It was not until recently, however, that it was determined that the State may not take citizenship away. Previously, the expatriation of an individual who voted in a foreign election and remained in a foreign country to avoid military service was upheld (82). At the same time, the Court held that the penalty of depriva-

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(74) *United States v. Seeger*, 380 U.S. 163, 184 (1965).

(75) Welsh v. United States, 398 U.S. 333 (1970).

(76) *Illinois ex rel McCollum v. Board of Education*, 333 U.S. 203 (1948). But it permitted students to leave school for a portion of the day to receive religious instruction elsewhere. *Zorach v. Clauson*, 343 U.S. 306 (1952).

(77) *Engel v. Vitale*, 370 U.S. 421 (1962).

(78) *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

(79) *Board of Education v. Allen*, 392 U.S. 236 (1968).

(80) *Walz v. New York City Tax Commissioners*, 397 U.S. 664 (1970).

(81) U.S. Const. amend. XIV.

(82) *Perez v. Brownell*, 356 U.S. 86 (1958).

tion of citizenship for military desertion was a "cruel and unusual punishment" in violation of the Eighth Amendment to the Constitution (83). Six years later the Court held that to denaturalize a naturalized citizen for residing in the land of his birth offends due process (84). Finally, three years later the Court said :

> *The very nature of our free government makes it completely incongrous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this nation against a congressional forcible destruction of his citizenship* (85).

Part of the significance of citizenship lies in the right to travel. In 1868, the Court, after noting the rights of the government to services from its citizens, stated correlative rights of the citizen :

> *He has the right to come to the seat of government to assert any claim he may have upon the government, or to transact any business he may have with it... He has a right to free access to its sea-ports,... to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercice of it* (86).

That opinion declared unconstitutional a tax on persons leaving the state. Seventy years later, a statute penalizing persons who aid the entrance of indigents into the state was held unconstitutional. The Court said there is a "prohibition against attempts on the part of any single state to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders (87)." On the basis of this principle, a century after first stating the travel rights of United States citizens, the Court held unconstitutional state statutes which required applicants for welfare to reside in the state for a year before being eligible for assistance (88).

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(83) *Trop v. Dulles*, 356 U.S. 86 (1958).
(84) *Schneider v. Rusk*, 377 U.S. 163 (1964).
(85) *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).
(86) *Crandall v. Nevada*, 73 U.S. 35, 44 (1868).
(87) *Edwards v. California*, 314 U.S. 160, 173 (1941).
(88) *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Another aspect of the right to travel is the right to leave the country. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law (89)." The Court ruled that the Secretary of State had no authority under existing statutes to deny passports to citizens because of their beliefs or associations (90). A later statute making it unlawful for a member of a communist organization to apply for or use a passport was held to be unconstitutional because it was not sufficiently "narrowly drawn to prevent the supposed evil (91)." The Secretary of State may refuse to validate passports for travel to specific places (92), but no criminal penalties exist for persons who travel in areas for which their passport is not validated (93).

II. — Criminal justice

Guarantees of full and effective participation in government are not enough. A democratic government can also destroy human rights. The need for protection against arbitrary governmental action is greatest in the criminal law process. Three major trends dominate developments in law enforcement during the past two decades. First, the specific Constitutional limitations on the federal government's power contained in the first eight Amendments have been construed to apply to the States as the "due process" which must be afforded by the states under the Fourteenth Amendment. Second, an affirmative obligation has been placed on the state to eliminate many of the disadvantages caused by the poverty of an accused criminal defendant. Finally, the Court has increasingly interpreted the Constitution to restrict the power of law enforcement agencies to disturb the dignity and privacy of individuals

A. — ARREST

An arrest is unlawful unless the state or federal arresting officer has "probable cause" to believe that the person arrested

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(89) *Kent v. Dulles*, 357 U.S. 116, 125 (1958).
(90) *Id.*
(91) *Aptheker v. Secretary of State*, *supra* note 37.
(92) *Zemel v. Rusk*, 381 U.S. 1 (1965).
(93) *United States v. Laub*, 385 U.S. 475 (1967).

has committed a crime (94). "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man is believing that the offense has been committed (95)." This requirement has been rigidly enforced. Where the arrest is pursuant to an arrest warrant, the information on which the warrant was based must state the facts which constitute probable cause, identifying the source of the information. If the information is not based on the personal observation of the officer applying for the warrant, he must give the original source of the information and reasons why the informant is to be believed (96). The right to resist without weapons an unlawful arrest is generally recognized (97). There are also civil and criminal statutes againts persons making unlawful arrests. But these remedies have not been completly effective (98). The Court has attempted to stop such unlawful practices by barring the use in criminal cases of any information or evidence obtained as a result of an unlawful arrest (99).

B. — SEARCH AND SEIZURE

The law of arrest is closely tield to that of search and seizure. Except where it is impossible to obtain a search warrant before the evidence will be moved or destroyed (100), a search without a search warrant is valid only if pursuant to a lawful arrest (101). Even then, the search must be reasonable (102) and extend only to the person of the defendant and the area "from within which he might gain possession

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(94) *Wong Sun v. United States*, 371 U.S. 471 (1963) ; *Ker v. California*, 374 U.S. 23 (1963).

(95) *Henry v. United States*, 361 U.S. 98, 102 (1959).

(96) *Giordenello v. United States*, 357 U.S. 480 (1957) ; *Aguilar v. Texas*, 378 U.S. 108 (1964).

(97) See PAULSEN and KADISH, *Criminal Law and Its Processes*, 536 (1969). But at least six states prohibit such resistance. Chevigny, « The Right to Resist an Unlawful Arrest, » 78 Yale L.J. 1128, 1133 (1969). Note, *Criminal Law : The Right to Resist Unlawful Arrest : An Out-Dated Concept*, 3 Tulsa L.J. 46 (1966) ; *People v. Cherry*, 307 N.Y. 308 (1954). ; *United States v. DiRe*, 332 U.S. 581, 594 (1948).

(98) Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955). Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. of Pa. L. Rev. 1182, 1206-12 (1952) ; LA FAVE, *Arrest, The Decision to Take A Suspect into Custody*, 412-25 (1965).

(99) *Wong Sun, supra* note 94.

(100) *Carroll v. United States*, 267 U.S. 132 (1925) ; *McDonald v. United States*, 335 U.S. 451, 455 (1948) ; *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

(101) *Chimel v. California*, 395 U.S. 346 (1957).

(102) See *Kremen v. United States*, 353 U.S. 346 (1957).

of a weapon or destructible evidence." (103). Like the arrest warrant, the search warrant must be based on "probable cause" ascertained from facts supplied the magistrate issuing the warrant (104). It must particularly describe "the place to be searched, and the persons or things to be seized" (105). The prohibition against "unreasonable searches and seizures" (106) applies to the states as well as the federal government (107) ; and...evidence secured unlawfully cannot be used by the state against a defendant (108).

The protection of the home against unreasonable searches has also been advanced by decisions holding that the Constitution requires a search warrant for an administrative search of the home (109) or place of business (110) as well as for searches under the criminal law. However, the opinions recognized that the "probable cause" required for a health or safety inspection would be less than that required for a search for criminal activity and might be satisfied by a showing that the area had not recently been inspected.

C. — EAVESDROPPING AND WIRETAPPING

The development of wiretapping and electronic eavesdropping devices have presented new and complex problems for the preservation of the security of the person and property of individuals. Evidence secured through a listening device attached to the person of a police informant who entered the premises at the invitation of the owner has been held admissible (111). But the Court indicated at an early date that the placing of a listening device on another's premises by trespass violated the Fourth Amendment (112), and the Court

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(103) *Chimel, supra* note 101.

(104) *Nathanson v. United States*, 290 U.S. 41 (1933) ; *Aguilar v. Texas, supra* note 96.

(105) U.S. Const. amend. IV.

(106) U.S. Const. amend. IV.

(107) *Wolf v. Colorado*, 338 U.S. 25 (1949).

(108) *Mapp v. Ohio*, 367 U.S. 643 (1961). Not applied retroactively. *Linkletter v. Walker*, 381 U.S. (1965).

(109) *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967).

(110) *See v. City of Seattle*, 387 U.S. 451 (1967).

(111) *On Lee v. United States*, 343 U.S. 747 (1952) ; but more recent cases suggest that the court may only allow such recordings to corroborate the testimony of a witness. *Lopez v. United States*, 373 U.S. 427 (1963) ; *Osborn v. United States*, 385 U.S. 323 (1966).

(112) *Irvine v. California*, 347 U.S. 128 (1954).

excluded evidence obtained by a spike mike which had been driven into a party wall (113). Finally, the Court held that the use of electronic devices to capture a conversation is a "search" under the Fourth Amendment, and that the "probable cause" and specificity requirements of a warrant are applicable (114), whether or not any trespass occurs (115).

Section 605 of the Federal Communications Act of 1934 which prohibited the unauthorized interception and divulgence of any communication by wire was construed to bar the use of wiretap evidence obtained by federal (116) or state (117) officers in federal or state (118) court. A 1968 statute now permits court- approved wiretapping to investigate certain crimes (119), but the recent decisions on electronic surveillance have made it clear that wiretapping is a "search and seizure" regulated by the Fourth Amendment of the Constitution (120).

D. — RIGHT TO COUNSEL

The Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to ... the assistance of counsel for his defense." (121). Since 1938 it has been recognized that in all federal criminal cases, the accused is entitled to have counsel furnished by the government if he is unable to pay for one (122). But in 1942 the Court held that due process did not require states to furnish counsel in non-capital cases (123). The validity of this decision was undermined when the Court held that a state violated the equal protection clause in refusing to provide indigents with a free transcript on which to base their appeal (124). Two decades after announcing that states need not furnish counsel to indigents, the Court reversed itself and said that the appoin-

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(113) *Silverman v. United States*, 365 U.S. 505 (1961).
(114) *Berger v. State of New York*, 388 U.S. 42 (1967).
(115) *Katz v. United States*, 389 U.S. 347 (1967).
(116) *Nardone v. United States*, 302 U.S. 379 (1937).
(117) *Benanti v. United States*, 355 U.S. 96 (1957).
(118) *Lee v. Florida*, 391 U.S. 378 (1968).
(119) 18 U.S.C., § 2516.
(120) *Katz v. United States*, *supra* note 115.
(121) U.S. Const. amend. VI.
(122) *Johnson v. Zerbst*, 304 U.S. 458 (1938) ; *Walker v. Johnson*, 312 U.S. 275 (1941). The statutory provision for providing counsel in federal courts is 18 U.S.C., § 53006 A.
(123) *Betts v. Brady*, 316 U.S. 455 (1942).
(124) *Griffin v. Illinois*, 351 U.S. 12 (1955).

tment of counsel for an indigent criminal defendant was a fundamental right essential to a fair trial.

> *From the beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him* (125).

Counsel must also be provided the indigent defendant for his appeal from a conviction (126).

The right to counsel attaches prior to trial. The police violate the defendant's right to counsel if they refuse his request to see his attorney while he is in the police station for questioning (127). A suspect is also entitled to have counsel present when he is shown to witnesses in a "lineup" for identification (128).

E — PRIVILEGE AGAINST SELF-INCRIMINATION

"No person... shall be compelled in any criminal case to be a witness against himself." (129).

> [C]*onvictions following the admission into evidence of confessions which are involuntary, i. e., the produce of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend and underlying principle in the enforcement of our criminal law ; that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his mouth* (130).

Physical coercion by federal or state officers is clearly prohibited (131). Psychological coercion, while also forbidden,

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(125) *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Applied retroactively *eg., Doughty v. Maxwell*, 376 U.S. 202 (1964).
(126) *Douglas v. California*, 372 U.S. 353 (1963).
(127) *Escobedo v. Illinois*, 378 U.S. 478 (1964).
(128) *United States v. Wade*, 388 U.S. 218 (1967).
(129) U.S. Const. amend. V.
(130) *Rogers v. Richmond*, 365 U.S. 534 (1961).
(131) *Brown v. Mississippi*, 297 U.S. 278 (1936).

is more difficult to determine. Cases in which the Court found unlawful psychological coercion include thirty-six hours of uninterrupted questioning (132), five hours interrogation of a fifteen year old boy (133), nine consecutive hours questioning of a mentally ill individual (134), and the refusal to permit a man to telephone his wife until he confessed (135). The difficulty of determining whether a confession was compelled by psychological coercion or given voluntarily is obvious. A standard which fluctuated with the individual's ability to withstand psychological pressures could provide little guidance for proper police conduct. The increasing concern of the Court to prevent police use of measures of psychological compulsion against suspects combined with the principle of the "right to counsel" cases that the poor and ignorant should receive the same treatment from the law as the wealthy and educated resulted in the formulation of a set of rules by the Court.

> [W]*hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized ... He must be warned prior to any questioning, that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him* (136).

Coercion to obtain self-incriminating statements is not limited to the police station. Investigations by grand juries or legislative committees may require the testimony of a witness. Refusal to answer may be punished. But if a responsive

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(132) *Ashcraft v. Tennessee*, 322 U.S. 143 (1943).

(133) *Haley v. Ohio*, 332 U.S. 496 (1948).

(134) *Blackburn v. Alabama*, 361 U.S. 199 (1960).

(135) *Haynes v. Washington*, 373 U.S. 503 (1963).

(136) *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). These rules do not apply retroactively. *Johnson v. New Jersey*, 384 U.S. 719 (1966).

answer to a question or an explanation of why it cannot be answered might furnish a link in the chain of evidence needed to prosecute criminally, the witness may assert his privilege against self-incrimination (137). The privilege protects a state witness against incrimination under federal as well as state law, and a federal witness against incrimination under state as well as federal law (138). Where the sanction for refusal to testify at an inquiry is dismissal from a government position, such testimony is considered "compelled" and may not be used against the witness in a criminal prosecution (139). Further, assertion of the privilege cannot be made ground for disbarment (140) or dismissal from a public teaching position, (141) unless the questions specifically relate to the performance of official duties (142). "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury (143)". Comment at trial by the prosecutor on the failure of the accused to testify is forbidden because it penalizes the assertion of the privilege (144).

F. — BAIL

The imprisonment of an individual prior to trial results in punishment prior to a determination of guilt. To ameliorate this condition, most states guarantee a right to bail set in every non-capital case. The amount of bail must not be excessive (145), and standards for fixing it in federal cases are set pursuant to the Bail Reform Act of 1966 whose stated purpose is :

> "...to assure that all persons regardles of financial statue, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention served neither the ends of justice nor the public interest (146)."

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(137) *Malloy v. Hogan*, 378 U.S. 1 (1964).
(138) *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).
(139) *Garrity v. New Jersey*, 386 U.S. 493 (1967).
(140) *Spevack v. Klein*, 385 U.S. 511 (1967).
(141) *Slochower v. Board of Education*, 350 U.S. 551 (1956).
(142) *Gardner v. Broderick*, 392 U.S. 273 (1968).

An important development has been the increasing use of "pre-trial parole" where the accused is freed on his own recognizance if the facts suggest that it is unlikely he will attempt to escape being tried (147).

G. — SPEEDY TRIAL

The accused is entitled to be speedily brought to trial (148). He may not be left languishing in jail or even free on bail for an unreasonable length of time. Even when the accused is released without bail because the prosecutor has filed a *nolle prosequi* (refusal to prosecute at this time) against the wishes of the defendant, the right to a speedy trial prevents the state from later rearresting him and trying him on the same charge (149).

H. — A FAIR TRIAL IN A FAIR TRIBUNAL

The Fourteenth Amendment to the United States Constitution provides in part : "nor shall any State deprive any person of life, liberty, or property, without due process of law (150)". An important trend of the past two decades has been the construction of this clause to make effective against the States other amendments which restrained federal action (151). But the requirement of due process has its own content as well. "A fair trial in a fair tribunal is a basic requirement of due process (152)."

Sustained prejudicial publicity prior to trial may make it impossible to obtain an impartial jury (153). The judge must transfer the venue to another jurisdiction where passions are not so inflamed or continue the case until the effect of the publicity has been dissipated (154). He must isolate the jury

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(147) AREA, Rankin and STUBZ, *The Manhattan Bail Project : An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L.Q. 67 (1963).

(148) U.S. Const. amend. VI.

(149) *Klopfer v. State of North Carolina*, 386 U.S. 213 (1967).

(150) U.S. Const. amend. XIV.

(151) *Gitlow v. New York*, 268 U.S. 652 (1925) (1st amend.) ; *Wolf, supra* note 107, *Mapp, supra* note 108, *Ker, supra* note 94 (4th amend.) ; *Malloy, supra* note 137 (5th amend.) ; *Gideon, supra* note 125 ; *Klopfer, supra* note 149 (6th amend.).

(152) *In re Muchison*, 349 U.S. 133, 136 (1954).

(153) The defendant is entitled to trial by a jury of his peers. U.S. Const. Art. III and Amend. VI.

(154) *Irvin v. Doud*, 366 U.S. 717 (1961).

from the effects of newspaper and radio reports during the trial (155), and the televising of a criminal proceeding is forbidden (156). Any limitation on spectators and newsmen at the trial must be applied with regard to the defendant's constitutional right to a "public trial" (157).

The accused is entitled to an unbiased judge (158). The jury, too, must be impartial (159). Nonwhites cannot be convicted by a jury if the state limits jury service to white (160). The Court has reversed numerous convictions because of subtle discriminatory jury selection procedures (161). Similarly, the state may not maintain racial segregation in the court (162).

The accused is also entitled to fairness on the part of the prosecution. It may not knowingly use perjured testimony or knowingly mislead the jury as to a material fact (163). It cannot suppress exculpatory evidence which would assist the defendant in his case (164).

Another protection of the accused's right to a fair trial is the requirement of the Sixth Amendment that he "be confronted with the witnesses against him" (165). This has been construed to apply to the states.

In one case, the petitioner was convicted on evidence which included statements of a witness made at a preliminary hearing at which the petitioner was present without counsel. The witness was not available at the trial. The Court held that in the absence of counsel petitioner did not have a constitutionally adequate right to cross-examine the witness and that the right to confront the witness includes the right to cross-

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(155) *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

(156) *Estes v. Texas*, 381 U.S. 532 (1965).

(157) U.S. Const. amend. VI. *Red Oliver*, 333 U.S. 257 (1948).

(158) See *Tumey v. Ohio*, 273 U.S. 510 (1927) where conviction for illegal possession of intoxication liquor was reversed because the judge was compensated from the fines paid by convicted persons. 28 U.S.C. sec. 144 provides : « Whenever a party to any proceeding makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. »

(159) U.S. Const. amend. VI *Remmer v .United States*, 350 U.S. 377 (1956).

(160) *Strauder v. West Virginia*, 100 U.S. 303 (1880).

(161) *Norris v. Alabama*, 294 U.S. 587 (1935) ; *Avery v. Georgia*, 345 U.S. 559 (1952) ; *Arnold v. North Carolina*, 376 U.S. 773 (1964).

(162) *Johnson v. Virginia*, 373 U.S. 61 (1963).

(163) *Mooney v. Holohan*, 294 U.S. 103 (1935). See *Miller v. Pate*, 386 U.S. 1 (1967).

(164) *Brady v. Maryland*, 373 U.S. 83 (1963).

(165) U.S. Const. amend. VI.

examine him (166). But if the defendant's conduct is greatly disruptive of the trial, the judge can continue trial without him until he promises to behave, can punish him for contempt or order him bound and gagged (167).

I. — DOUBLE JEOPARDY

"...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb (168)."

The State with all its resources and power should not be allowed to make repeated attempts to convict an alleged offender, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty (169).

The Court has been zealous in its protection of the individual. A conviction of murder in the second degree was held to amount to an acquittal of murder in the first degree which precluded a new trial for the graver offense when the conviction for the lesser offense was overturned (170). An acquittal improperly directed by the judge because of prosecutorial misconduct was held to bar a new trial (171). Even when the jury was discharged before any testimony had been offered because the prosecution failed to issue a summons to its principal witness, the Court held that the defendant could not be tried by a second jury (172). This prohibition against double jeopardy also prevents the states from trying an individual twice (173).

Nevertheless, the possibility of being tried twice for the same act persists. An acquittal of a federal crime does not bar reprosecution for a state crime although the factual elements of the crimes are identical (174). Similarly, a state trial

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(166) *Pointer v. Texas*, 380 U.S. 400 (1965).
(167) *Illinois v. Allen*, 397 U.S. 337 (1970).
(168) U.S. Const. amend. V.
(169) *Green v. United States*, 55 U.S. 184, 187-88 (1957).
(170) *Id.*
(171) *Fong Foo v. United States*, 369 U.S. 141 (1962).
(172) *Downum v. United States*, 372 U.S. 734 (1963).
(173) *Benton v. Maryland*, 395 U.S. 784 (1969).
(174) *Bartkus v. Illinois*, 359 U.S. 121 (1959). But acquittal of municipal crime bars reprosecution for a state crime where elements are identical. *Waller* v.

for an offense does not bar a federal prosecution (175). This retrogressive state of the law has some practical beneficial effects for human rights since individuals in the South who might be acquitted in the state courts or given mild sentences for offenses against civil rights workers are still subject to federal prosecution (176).

J. — LIMITATIONS ON CRIMINAL STATUTES

There are numerous constitutional limitations on what conduct may be made criminal. "No Bill of Attainder or ex post fact Law shall be passed" (177). "No State shall ... pass any Bill of Attainder, ex post facto Law..." (178). A statute must be sufficiently explicit to inform those subject to its provisions what conduct on their part will render them liable to its penalties (179). The Court will reverse a conviction where the record reveals no evidence of the defendant's guilt (180). Constitutional guarantees previously discussed, such as the right to free speech, protect certain conduct from criminal sanctions. The Court has also found a right of marital privacy emanating from several specific constitutional guarantees which prevents a state from making the use of contraceptives a criminal offense (181). The prohibition against the infliction of "cruel and unusual punishment" (182) prohibits the enactment of laws punishing the status of an individual, e.g., drug addiction (183).

K. — PUNISHMENT

The main concerns of the Court have been with the processes of apprehension of a suspect and adjudication of his

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(175) *Abbate v. United States*, 359 U.S. 187 (1959).

(176) *United States v. Guest*, 383 U.S. 745 (1966). Defendants acquitted in state murder trial were later tried under federal law for attempting to discourage negroes from entering the state by the murder of a negro who had done so.

(177) U.S. Const. Art. I, sec. 9, cl. 3. See *U.S. v. Brown*, *supra* note 47.

(178) U.S. Const. Art. I, sec. 10

(179) *See Lanzetta v. New Jersey*, 306 U.S. 451 (1939) invalidating a statute which made it a crime to be a member of a « gang ».

(180) *Garner v. Louisiana*, 368 U.S. 157 (1961).

(181) *Griswold v. Connecticut*, 381 U.S. 479 (1965).

(182) U.S. Const. amend. VIII.

(183) *Robinson v. California*, 370 U.S. 660 (1962). But the Court upheld a conviction for being found in a state of intoxication in a public place. *Powell v. Texas*, 392 U.S. 514 (1968).

guilt. The Court now may begin to concern itself with the treatment of persons convicted of crimes. A district court has already found that conditions in one state prison where inmates were subject to violence and homosexual attacks from other inmates constituted "cruel and unusual punishment" and ordered the state to improve conditions or close the prison (184).

The Court is now facing a series of challenges by indigents to inequities resulting from jail or fine sentences e.g., $ 50 fine or ten days in jail. In the first case this nature, the Court dealt with a sentence for the maximum term provided by statute plus a fine permissible under the statute. The Court held that the indigent could not be made to serve any additional time for his failure to pay the fine. "We conclude that when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay (185)." A companion case was remanded to the lower courts because the state had changed the statute which was being challanged. Four of the nine judges in an opinion concurring in the remand expressed their opinion as to cases where the jail term served for nonpayment of the fine might be less than the jail sentence which the court could have given initially for the crime. "The constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full" (186).

L. — RIGHTS OF JUVENILES AND MILITARY PERSONNEL

At least two categories of persons have been historically denied many of the protections afforded by the Constitution. The juvenile court system was adopted under the theory that the state would take the role of the parent, and consequently procedural rights would not be available. However, the Court recently held that the due process clause requires delinquency adjudications to "measure up to the essentials of due process

(184) *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).
(185) *Williams v. Illinois*, 399 U.S. 235, 240-1 (1970).
(186) *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970).

and fair treatment" (187). The precise nature of the "essentials" is still being litigated.

The rights of military personnel are protected by the Uniform Code of Military Justice: Congress is empowered "To make rules for the Government and regulation of the land and naval forces." (188). Whether other constitutional guarantees are still applicable to military personnel is unclear (189). The military courts have acted on the assumption that such guarantees apply but that the factual context of military life permits many infringements on liberty which would not be permissible if imposed on civilians (190).

III. — EQUAL PROTECTION OF THE LAWS

Respect for the law is based in part on the belief that the laws are fair and the society which they preserve is just. The riots which have occured in the United States in recent years in New York, New Jersey, Michigan and California indicate that many negroes in the United States don't believe in the fairness of the law or the justice of the society. The Fourteenth Amendment guarantees to all persons the "equal protection of the laws." (191). This provision has, however, not been sufficient to cope with deeply rooted social prejudice, and it has been necessary for the federal and state legislatures to act against racial discrimination. Several developments in eliminating racial discrimination have already been noted in the sections devoted to voting, freedom of speech and assembly, and fair trial.

The past twenty years have seen an abrupt reversal in the attitude of all branches of government from toleration of racial discrimination to a resolve to eliminate it. Previously, the Court had permitted racial separation if the separate facilities were equal (192). This made each case a factual one of

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(187) *In Re Gault*, 387 U.S. 1 (1967).

(188) U.S. Const. Art. I, sec. 8.

(189) Compare *Application of Stapley*, 246 F. Supp. 316 (D. Utah 1965) with *Kennedy v. Commandant, United States Disciplinary Barracks*, 258 F. Supp. 967 (D. Kan 1966).

(190) *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967) upholding the conviction of an officer for carrying a sign in a demonstration which said « Let's have more than a choice between petty ignorant fascists in 1968 » and « End Johnson's fascist aggression in Vietnam. »

(191) U.S. Const. amend. XIV.

(192) *Plessy v. Ferguson*, 163 U.S. 537 (1896).

presenting masses of physical, social and psychological data to prove the facilities were not equal—a task which few were willing and able to undertake. Beginning in 1954 the Court found that classifications based on race violated the equal protection clause. Thus, all that needed to be shown to invalidate the law was that the state separated the races. The Court has also been increasingly willing to find state participation in racial discrimination rendering it illegal even though the state involvement may be minimal and indirect. Finally, the President and Congress during the last decade have taken an affirmative role by laws and executive orders directed at eliminating discrimination.

A. — EDUCATION

The best known landmark in the struggle against racial segregation is *Brown v. Board of Education,* (193) which held that segregation in public education is a denial of equal protection of the laws. "To separate ... [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" (194). States attempted to avoid the effects of the *Brown* decision by closing public schools and using state or county funds to support directly or indirectly privately owned schools which were segregated. The Court held this unconstitutional (195). Voluntary transfer plans based on racial factors tending to perpetuate former segregation were invalidated (196). The Attorney General was empowered by legislation to bring suits to integrate schools

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(193) 347 U.S. 483 (1954). *Brown* was based on the equal protection clause of the Fourteenth Amendment, but in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court held that school segregation in the District of Columbia where the Fourteenth Amendment does not apply was a violation of the due process clause of the Fifth Amendment. Since Brown, the Court has held segregation unconstitutional in numerous other areas, including public beaches and bathhouses (*Mayor of Baltimore v. Dawson*, 350 U.S. 877 [1955]), municipal golf courses (*Holmes v. City of Atlanta*, 350 U.S. 879 [1955]), buses (*Gayle v. Browder*, 352 U.S. 903 [1956]), public parks (*New Orleans City Park Development Ass'n. v. Detiege*, 358 U.S. 54 [1958]), municipal auditoriums (*Shiro v. Bynum*, 375 U.S. 395 [1964]). The repudiation in Brown of the « separate but equal » doctrine led to the conclusion that race is not a valid basis for classification in a legislative enactment. Consequently, laws barring interracial marriages are unconstitutional although they penalize both the white and the nonwhite. *Loving v. Commonwealth of Virginia* 388 U.S. 1 (1967).

(194) *Brown, supra* note 193 at 494.

(195) *St. Helena Parish School Board v. Hall*, 358 U.S. 515 (1962) ; *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

(196) *Goss v. Board of Education*, 373 U.S. 683 (1963).

whenever private persons were unable to do so (197). Southern schools have long delayed integration, using the language of the *Brown* decision—"with all deliberate speed"—as an authorization to stall, but the Court has said "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionaly permissible. (198). Some states in the deep South refuse to integrate unless ordered by the Court in the local area. This means that a suit must be brought in each individual district in order to get the school in that district segregated. The expenditure of manpower to obtain this end is enormous and progress has been very slow. The federal government has failed to enact the kind of significant legislation which it enacted with respect to voting rights, and the resources of private groups such as the N.A.A.C.P. Legal Defense Fund, Inc. which bear the primary brunt of the integration effort are quite limited. However, as a result of the Court decisions, integration will be ordered in every case in the deep South where a suit is brought. The executive, so far, has always been willing to enforce the court orders to prevent anarchy and disrespect for such orders. Thus, although the process is slow and painful, integration will eventually result (199). It is hoped that additional resources will be devoted to the efforts to obtain integration in the schools.

The state policy of segregation in the South has its counterpart in "de facto" segregation in the North. Social and economic discrimination has resulted in negroes living in the same areas in large cities. Children are assigned to the school nearest them. Thus, within the citywide school system, one school may be predominantly negro while the others are predominantly white. The problem has not yet been successfully resolved. The underlying job and housing discriminations which lead to ghettos are being attacked, but many lower courts have held that the school boards have no affirmative duty to realign school districts to achieve better inte-

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(197) 42 U.S. C. sec. 2000 c-6.

(198) *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

(199) This assumes that the white and black population continue to live in the same neighborhood as they have historically done in te South. There is some evidence, however, that whites are leaving the city in the South, to avoid integration among other reasons, and this tendency may result in de facto school segregation in the South. The Courts have been attempting to face the problems this presents. One type of plan would require students to take buses to schools out of their immediate neighbourhood so that an appropriate racial balance could be achieved. Some varieties of this plan are being argued before the court as this paper is written. *Charlotte Mecklenburg Board v. Swann.*

gration (200). School boards may take race into account in order to relieve racial imbalance (201), however, and the state of Massachusetts requires school districts to prepare a plan to eliminate racial imbalance whenever the total number of nowhite students in a public school is in excess of fifty percent of the total pupils (202).

B. — HOUSING

A state court may not enforce a restrictive covenant on property which prohibits sale to negroes (203). At least sixteen states have fair housing laws requiring nondiscrimination in sale or rental which apply to private housing (204). California attempted to abrogate its fair housing law by an amendment to the state constitution which prohibited the state from limiting the power of the individual to sell to whom he choses. The Court found that this amendment provided state authorization of discriminatory practices. The Court said that the amendment encouraged housing discrimination and was, therefore, unconstitutional as state action aiding racial discrimination (205).

All departments and agencies of the federal government have been directed by executive order to take action to prevent discrimination in the sale, leasing or rental of any government owned, operated, or assisted housing (206). In 1968 Congress passed a statute (207) which forbids discrimination in the sale or rental of housing by anyone except by an individual selling his own personal residence or an individual renting to less than four families in a dwelling which the owner himself occupies. In the same year the Court interpreted a statute which had been enacted in the nineteenth century 208) shortly after the Civil War to forbid discrimination in sales by pri-

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(200) *Bell v. School City of Gary, Indiana*, 324 F. 2d 209 (7th Cir. 1963). *But see Booker v. Board of Education of Plainfield*, 45 N.J. 161 (1965).

(201) *Addabbo v. Donovan*, 22 App. Div. 2d 383 (2d Dept. 1965), affd. 16 N.Y. 2d 619 (1965), *cert. den.* 382 U.S. 905 (1965).

(202) Mass G. L. ch. 71, sec. 37D.

(203) *Shelley v. Kraemer*, 334 U.S. 1 (1948).

(204) Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* 1618 (1967).

(205) *Reitman v. Mulkey*, 387 U.S. 369 (1967).

(206) Executive Order No. 11063, 27 Fed. Reg. 11527 (1962).

(207) 42 U.S.C. § 3601.

(208) « All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property. » 42 U.S.C. § 1982.

vate individuals to others (209). Since then the old Civil War statute has been applied to rights in a country club which was associated with a housing development (210). Although the cases interpreting the old Civil Rights statute involved large developments, their reasoning indicated that even private individuals who would be exempted from the 1968 legislation would be prohibited from discriminating in the sale of property by the earlier statute. The 1968 statute provides more effective procedures and extensive remedies, so it is preferable to the civil injunctive proceedings under the earlier statute.

C. — EMPLOYMENT

Thirty-six states have laws which make racial discrimination in employment illegal (211). Discrimination in federal employment is prohibited (212) and contracts of private companies with the government include a clause against discrimination (213). In addition, the National Labor Relations Act makes it an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee (214). A labor union which acts as the statutory representative of a craft has "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates (215).

Employment in activities or industries affecting commerce and employing more than twenty-five persons for at least twenty weeks each year are covered by Title VII of the Civil Rights Act of 1964 (216). That Act makes it illegal for an employer or labor organization to discriminate against any individual because of his race, color, religion, sex, or national origin. This includes practices such as advertising for employment or membership which indicates preference or discrimination. Lower courts have interpreted the prohibition

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(209) *Jones v. Mayer Co.*, 392 U.S. 409 (1968).
(210) *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).
(211) Emerson, Haber and Dorsen, *supra* note 204 at 1512-13.
(212) Executive Order No. 11246, 30 Fed. Reg. 12319 (1965).
(213) *Id.*
(214) 20 U.S.C. sec. 141.
(215) *Steel v. Louisville and Nashville R.R. Co.*, 323 U.S. 192 (1944).
(216) 42 U.S.C. sec. 2000e.

against discrimination in Title VII not only to forbid discrimination in hiring but also to require employers in promoting and filling vacancies to consider their negro employees on the basis of seniority with the company and not to utilize past discrimination against negroes in certain types of jobs as a hindrance to their future promotions. In other words, negro employees who had been discriminated against in the type of job available to them, are given credit for their past service with the company in whatever capacity although white employees might be required to have served in a particular type of job with the company before being eligible for promotion (217).

D. — PUBLIC ACCOMMODATIONS

The Fourteenth Amendment forbids discrimination in facilities owned (218) or operated (219) by the state or any subdivision thereof. Thirty-seven states have enacted civil rights statutes providing criminal, civil and/or administrative remedies for persons subjected to discriminatory treatment in the use of public accommodations (220) (facilities open to the public whether owned by the state or by private individuals). The most thorough coverage of this area is Title II of the Civil Rights Act of 1964 which provides that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, accommodations, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin (221)." This statute applies to all public accommodations affecting commerce with an exemption for "private clubs". But the courts have strictly construed this exception. For example, an effort by the proprietor to make an amusement area a "private club" by establishing membership cards and dues to gain entrance to the area was struck down by the Court as a ruse or device to avoid the statute (222).

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(217) *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

(218) *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

(219) *See Evans v. Newton*, 382 U.S. 296 (1966). *See also* not 180.

(220) Emerson, Haber and Dorsen, *supra* note 204 at 1679-80.

(221) 42 U.S.C. sec. 2000a. Upheld as constitutional. *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964). *Katzenbach v. McClung*, 379 U.S. 294 (1964).

(222) *Daniel v. Paul*, 395 U.S. 298 (1969). The same case illustrates the scope of the limitation to « places affecting commerce. » The only ties which the recreational facility had to interstate commerce were that it was open to interstate travelers, that the ingredients of the hot dogs, rolls and soft drinks

SUMMARY AND CONCLUSION

In the past two decades there have been many developments strengthening human rights in the United States. The right to vote has been extended by the abolition of the poll tax and by law protecting the rights of the negroes. Restrictions on speech and movement have been sharply limited. The rights of the citizen have been secured more firmly by the application to the states of the constitutional guarantees against improper federal governmental action. The most significant development in this area has been the formulation of a set of rules for police conduct subsequent to arrest. It is only within the past two decades that the United States has faced up to the problems of racial discrimination and begun to do something to combat them.

This paper has discussed developments in human rights. It has not looked carefully at those areas of fear, prejudice, and arbitrary action where progress has not been made. Much has been done, but much remains. Yet the accomplishments of the past offer hope for steady advancement in the future

served at the refreshment stand came from other states, that the juke box was made out of state, and that its paddleboats were leased from an out-of-state company. Almost every place open to the public would have that much of a relationship to interstate commerce.